No. 98-1904

In The

Supreme Court of the United States

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; AND UNITED STATES DEPARTMENT OF STATE,

Petitioners,

v.

LESLIE R. WEATHERHEAD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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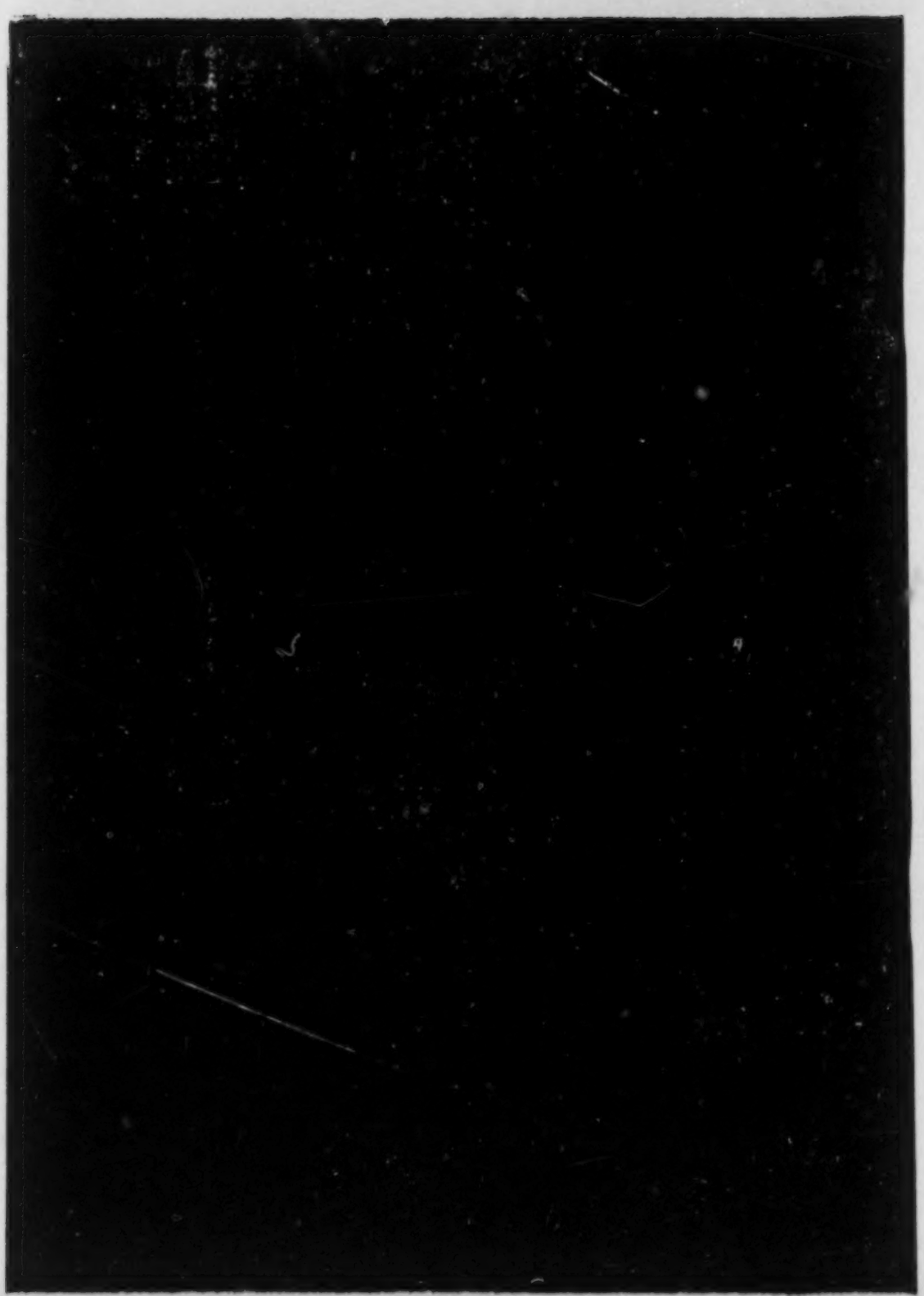

QUESTION PRESENTED

Whether the first court of appeals' decision under Exemption 1 of the Freedom of Information Act ("FOIA") to interpret and apply a new and significantly less protective executive order governing classification properly rejected the government's generalized and conclusory statements of possible harm involving the release of a single letter whose content is admittedly innocuous.

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STATEMENT OF THE CASE

1. The Freedom of Information Act, 5 U.S.C. § 552 was originally enacted in 1966 as an amendment to Section 3 of the Administrative Procedure Act. *See* Pub. L. No. 89-554, 80 Stat. 378 (Sept. 6, 1966).[1] The amendment was thought necessary because "Section 3 was generally recognized as falling short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute." *EPA v. Mink*, 410 U.S. 73, 79 (1973) (citations omitted). As this Court has recognized many times, the FOIA's "basic purpose reflected 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' " *Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., at 3 (1965)). *See also Department of Defense v. F.L.R.A.*, 510 U.S. 487, 494 (1994) (same); *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 754 & n.4 (1989) (same). Because "disclosure, not secrecy, is the dominant objective of [FOIA]" *Rose*, 425 U.S. at 361, the nine specific exemptions to disclosure contained in the statute are to be narrowly construed. *Department of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) ("Consistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass.") (citations omitted). *See also id.* ("Congress sought 'to insulate its product from judicial tampering and to preserve the emphasis on disclosure by admonishing that the availability of records to the public is not limited, except as *specifically* stated.' ") (quoting *FBI v. Abramson*, 456 U.S. 615, 642 (1982) (O'Connor, J., dissenting)) (emphasis in original) (further citations omitted). It is also common ground that the government bears the burden of proof in justifying the invocation of any exemption.

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[1] Petitioners' omission of any discussion regarding the background of FOIA Exemption 1 or the genesis of the new executive order issued by President Clinton in 1995 has required an expanded statement of the case by Respondent.

Department of State v. Ray, 502 U.S. 164, 173 (1991) ("[T]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.") (citations omitted).

The evolution of Exemption 1 of the FOIA, 5 U.S.C. § 552(b)(1), exemplifies Congress' commitment to disclosure tempered only by carefully circumscribed areas of necessary government secrecy. Exemption 1 originally exempted from disclosure any matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." 5 U.S.C. § 552(b)(1) (1973). In 1973, this Court held in *EPA v. Mink*, that FOIA did not authorize judicial review of "the soundness of executive security classifications" or *in camera* inspection of documents withheld under Exemption 1. *Mink*, 410 U.S. at 84.

Congress responded swiftly. In 1974 it amended FOIA and specifically overruled this Court's decision in *Mink*. Pub. L. No. 93-502 §§ 1-3, 88 Stat. 1561 (Nov. 21, 1974). Exemption 1 was amended to require both that the matters withheld be "specifically authorized under criteria established by an Executive order to be kept secret" and that such matters be "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1)(A) & (B) (1999). In the same 1974 amendments, Congress also amended the statute to make clear that the burden is on the withholding agency to establish the applicability of an exemption, that the reviewing court is authorized to examine the withheld information *in camera*, and that "the court shall determine the matter *de novo*." 5 U.S.C. § 552(a)(4)(B).

Thus, as amended, Exemption 1 is unique among the FOIA exemptions. It places the initial decision as to the criteria for classification entirely within the discretion of the Executive Branch. At the same time, it requires the Executive to scrupulously adhere to whatever substantive criteria he promulgates. Moreover, contrary to *Mink*, the federal courts are now expressly required to ascertain whether a matter is properly classified under the criteria and procedures chosen by the Executive. Nor do the

highly deferential standards of review generally applicable to agency action apply; rather, federal courts must determine the matter *de novo*. "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the burden 'on the agency to sustain its action' and directs the district court to 'determine the matter *de novo*.' " *Reporters Comm.*, 489 U.S. at 755 (quoting 5 U.S.C. § 552(a)(4)(B)). Thus, under Exemption 1 the Executive Branch is the exclusive source of both the procedural and substantive requirements for classification. Under FOIA, the courts are required to ensure that the Executive abides by his own executive order.

In order to properly undertake judicial review of FOIA exemption claims, the federal courts have developed the concept of a *Vaughn* index, named for the District of Columbia Circuit's seminal decision in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Consistent with the burden allocation in FOIA, *Vaughn* places the initial burden on the agency to come forward with specific and detailed justifications identifying the subject matter withheld and giving a "relatively detailed analysis" as to why an exemption applies. *Id.* at 826. *See also id.* ("[C]ourts will simply no longer accept conclusory and generalized allegations of exemptions.") (footnote omitted). The *Vaughn* procedure allows for at least a modified form of the adversarial process in a context where the requestor is necessarily in the dark as to the content of the documents at issue in the case. The *Vaughn* procedure has been adopted by every federal circuit. It applies to every FOIA exemption, including Exemption 1. *See, e.g., Ray v. Turner*, 587 F.2d 1187, 1195 (D.C. Cir. 1978).

2. The first executive order prescribing a classification system for government secrets was promulgated by President Franklin D. Roosevelt in 1940. Exec. Order No. 8,381, 3 C.F.R. 634 (1941). In 1951, President Truman promulgated a comprehensive and highly restrictive regime for the protection of state secrets. Exec. Order No. 10,290, 3 C.F.R. 789 (1952). President Truman's order was roundly criticized as too restrictive and a succession of executive

orders from President Eisenhower through President Carter gradually relaxed the standards for classification. *See generally* Mary M. Cheh, *Judicial Supervision of Executive Secrecy: Rethinking Freedom of Expression for Government Employees and the Public Right of Access to Government Information*, 69 CORNELL L. REV. 690, 690 n.3 (1984). This trend culminated in President Carter's 1978 executive order that required classifying officials to point to "identifiable damage" from disclosure. It also provided that any uncertainty as to disclosure should be resolved in favor of public access. *See* Exec. Order No. 12,065, 3 C.F.R. 190 (1979) (hereinafter "Carter Order").

On April 2, 1982, President Reagan issued Executive Order No. 12,356, superseding the prior order promulgated by President Carter. Exec. Order No. 12,356, 3 C.F.R. 166 (1983) (hereinafter "Reagan Order," reprinted in the Appendix hereto ("Resp. App.") at 1a-25a.). The Reagan Order significantly broadened the power of executive agencies to classify information pursuant to national security and foreign policy concerns. First, it eliminated the provision of the Carter Order conferring discretion on classifying officials to balance the public interest in disclosure against national security concerns. Second, it reestablished the presumption in favor of classification in the case of doubt. Resp. App. 3a. Third, it eliminated the requirement of the Carter Order that a classifying official point to "identifiable damage" from disclosure. Resp. App. 7a. Fourth, it reestablished the so-called "mosaic" theory of classification, by providing that information should be classified where its unauthorized disclosure, "either by itself or in the context of other information," could be expected to cause damage to the national security. Resp. App. 7a. Finally, and most important here, the Reagan Order erected a presumption that the national security would be damaged by the revelation of "foreign government information": "Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods *is presumed*

to cause damage to the national security." Resp. App. 7a (emphasis added). The term "foreign government information" was defined to include: "information provided by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation, *expressed or implied*, that the information, the source of the information, or both, are to be held in confidence." Resp. App. 24a (emphasis added).[2]

On April 17, 1995, in fulfillment of a campaign promise, President Clinton issued an executive order that reversed President Reagan's protective approach to national security information and went beyond even President Carter's executive order in discouraging classification and promoting disclosure. Exec. Order No. 12,958, 3 C.F.R. 333 (1996) ("Clinton Order") (reprinted in Appendix to the Petition for Certiorari ("Pet. App.") 65a-111a). Designed specifically to "emphasize our commitment to open Government," the Clinton Order reinstated the Carter Order's presumption in favor of disclosure rather than classification in the case of any uncertainty. Pet. App. 65a, 68a. The Clinton Order also eliminated the "mosaic" theory of classification based on context and specifically eliminated the presumption that the release of foreign government information would cause harm to the national security. Instead, for all classification decisions, the Clinton Order requires the classification authority to be "able to identify or describe the damage" to national security. Pet. App. 68a. The Clinton Order eliminates the Reagan Order's

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[2] President Reagan's executive order was roundly criticized as overly protective by academics, *see generally*, Cheh, *supra*; Anthony R. Klein, *National Security Information: Its Proper Role and Scope in a Representative Democracy*, 42 FED. COM. L.J. 433 (1990), by the press, *see* Floyd Abrams, *The New Effort to Control Information*, N.Y. Times, Sept. 25, 1983, § 6 (Magazine) at 22-23, and by some members of Congress who proposed legislative intervention to reestablish the more open Carter regime. *See* S. 1335, 98th Cong., 1st Sess. § 3 (1983) (bill sponsored by Sen. Durenberger to amend Exemption 1 to reverse Reagan Order).

allowance that an expectation of confidentiality may be "expressed or implied," Resp. App. 24a, for information to qualify as foreign government information. Pet. App. 66a. Finally, the Clinton Order adopts the following definition: " 'Damage to the national security' means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." Pet. App. 67a-68a. This was not a defined term in the Reagan Order.

Under the Clinton Order there is no longer a presumption that government-to-government communications are not subject to disclosure. The fact that such communications are exchanged in confidence is irrelevant; all "foreign government information" is, by definition, exchanged in confidence. Pet. App. 66a. More must now be shown under the Clinton Order in order to justify withholding diplomatic communications under Exemption 1 – a specific harm must be identified or described and that harm must be linked to the dissemination of the information itself. Pet. App. 67a-68a.

President Clinton's signing statement issued in conjunction with the new executive order left no doubt that he intended the order to "sharply reduce the permitted level of secrecy in our Government." 31 WEEKLY COMP. PRES. DOC. 633 (Apr. 17, 1995) Resp. App. 26a-28a. The statement indicates that "[t]his order establishes many firsts: Classifiers will have to justify what they classify. . . . " Resp. App. 27a. The President's statement makes particularly clear that the Clinton Order eliminates any presumption that certain categories of documents are not subject to disclosure:

> [W]e will no longer tolerate the excesses of the current system. For example, we will resolve doubtful calls about classification in favor of keeping the information unclassified. We will not permit the reclassification of information after it has been declassified and disclosed under proper authority. We will authorize agency heads to balance the public interest in disclosure against the national security interest in making declassification decisions. And, *we will no longer presumptively classify certain categories of information, whether or not the specific information otherwise meets the strict standards for classification.*

Resp. App. 27a (emphasis added).[3] Implementation of the Clinton Order, the President stated, "will greatly reduce the amount of information that we classify in the first place and the amount that remains classified." Resp. App. 28a.

As we discuss in detail below, given this background and the broad claims of increased access made in conjunction with the Clinton Order, this Court should cast a wary eye indeed at the Solicitor General's suggestions that the changes wrought by the new order are mere "happenstance," Petition for Certiorari ("Pet.") at 22, and that court of appeals decisions applying the Reagan Order somehow "conflict" with the decision below. Pet. at 13-14. Rather, as the district court noted, the Clinton Order constitutes a "major shift in policy." Pet. App. 25a. Indeed, in the court below, the government argued that the Reagan Order applied and was dispositive. Pet. App. 26a-27a. Now, the Solicitor General tells this Court that the differences between the two orders are immaterial.

4. Respondent Leslie R. Weatherhead is a lawyer in private practice in Spokane, Washington. Respondent represented Sally-Anne Croft, a British national, who was indicted in 1990 by a federal grand jury in Oregon on two counts of conspiracy. The first alleged conspiracy contemplated an attack on a federal officer (it was never attempted), and the second alleged conspiracy involved illegal interstate transportation of firearms. Sometime after

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[3] Evidently, this new policy favoring disclosure over classification was not supported by all the affected agencies within the Executive Branch. *See, e.g.*, R. Jeffrey Smith, *CIA, Others Opposing White House Move to Bare Decades-Old Secrets*, Washington Post, Mar. 30, 1994, at A14.

her indictment, the United States requested Croft's extradition by the British government.

The United States' request for Croft's extradition was attended by considerable controversy in Great Britain. The British (among them, specifically, several members of the House of Lords) publicly worried about whether Croft, an accountant who had been a follower of the guru Bhagwan Shree Rajneesh, could receive a fair trial in the District of Oregon, a place where Rajneesh had established his commune and had achieved especial notoriety and hostile press coverage. In their requests for extradition, American officials reassured the British that any prejudice could be dealt with under American procedural law by a change of venue as well as other mechanisms to ensure an impartial petit jury. Pet. App. 2a-3a.

On or about July 28, 1994, Croft and her codefendant were extradited from Great Britain to the United States. Shortly after her first appearance, Croft requested a change of venue based on a widespread and pervasive prejudice against Rajneesh and his "cult" members throughout the District of Oregon. The government opposed Croft's request for a change of venue and, in fact, even opposed any evidentiary hearing into the extent of local prejudice against the Rajneesh group.

Respondent, Croft's attorney, learned of the letter at issue in this case, a July 28, 1994, letter sent by the British Home Office to the Department of Justice, in conjunction with Croft's extradition to the United States. Respondent believed that the letter contained both an official expression of British concern over the issue of potential prejudice against Croft in Oregon and a recitation of the assurances regarding change of venue and other remedies that American officials had discussed with the British to induce extradition. Respondent believed that evidence of these British concerns and subsequent American assurances were relevant to the trial judge's decision whether to order a change of venue. Pet. App. 3a. Contrary to the government's present argument, it did disclose to the district court the British Government's refusal to extradite Croft for trial on

the firearms trafficking count. Pursuant to the doctrine of specialty, the firearms count was severed and not tried.[4] However, the prosecutors had remained silent concerning any change of venue discussion in the British letter.

On November 29, 1994, Respondent requested a copy of the letter under the Freedom of Information Act from both the Departments of Justice ("Justice") and State ("State"). Although Respondent's request identified the letter by date, subject matter, and name of addressee, the government did not respond within ten days as then required by the Act. 5 U.S.C. § 552(a)(6)(A)(i).[5] Indeed, the government failed to respond to the request for six full months. Finally, on May 4, 1995, State informed Respondent that it had been unable to locate the letter. Two weeks later, Justice informed Respondent that it had a copy of the letter, but had forwarded it to State for further review.

Respondent again wrote to both agencies, asking Justice for administrative review of its failure to provide him the letter, and asking State, now that it had the letter, to produce it. Neither Justice nor State replied that the letter was classified. Justice's administrative review officer

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[4] While Respondent cannot say with absolute certainty that the British Government's limitations on extradition were contained in the letter at issue here, everything in this record points to that fact. As we discuss in more detail below, *see infra* pp. 26-27, prosecutors are often required to disclose the extradition communications of foreign governments to state and federal courts in the United States under provisions of extradition treaties that may delimit the prosecution. This practice flies in the face of the government's assertion that these documents are categorically confidential. *See* Pet. App. 53a-54a (Sheils Declaration); Pet. App. 57a-58a (Kennedy Declaration).

[5] A 1996 amendment, effective after the request in this case, extended to 20 business days the time agencies are given to respond to an initial FOIA request. *See* Pub. L. No. 104-231, 110 Stat. 3048, § 8(b) (1996).

remanded to the Criminal Division with instructions that Justice reconsider its refusal to disclose the letter. State wrote to the British Home Office, saying that State intended to release the letter and asking for British concurrence. The British government demurred, solely because it considered all government-to-government correspondence confidential, subject to an important qualification: "the normal line in cases like this is that all correspondence between Governments is confidential *unless papers have been formally requisitioned by the defense.*" Pet. App. 3a (internal quotations omitted) (emphasis added).[6]

On November 17, 1995, Respondent filed a complaint in federal district court for the Eastern District of Washington under FOIA, seeking to compel Justice and/or State to produce the letter. In December 1995, over a year after Respondent's initial FOIA request, State reported that it had classified the letter in October 1995. In February 1996, Justice informed Respondent that it had reconsidered its decision to withhold the letter and, in view of State's decision to classify the letter, would not release it.

With this administrative background, on February 16, 1996, Respondent moved for summary judgment. State and Justice produced declarations under oath from Mr. Peter M. Sheils, Pet. App. 48a – 54a, and Mr. Patrick F. Kennedy, Pet. App. 55a – 59a, both administrative officials at the State Department.[7] Both declarations alluded to the general presumption that government-to-government communications should remain confidential and to the British government's request for continued confidentiality

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[6] The State Department's August 4, 1995, letter to the British government asking for permission to release the letter and the British response of October 18, 1995, are reprinted in the Appendix hereto at 29a-31a.

[7] Mr. Sheils declaration was filed in opposition to Respondent's motion for summary judgment. Mr. Kennedy's declaration was filed after the district court's initial decision ordering disclosure in support of the government's motion to alter or amend judgment under Fed. R. Civ. P. 59(e).

in this case. See Pet. App. 52a (Sheils Declaration) ("There is a general understanding among governments that confidentiality is normally to be accorded exchanges between governments."); Pet. App. 56a (Kennedy Declaration) ("It is a longstanding custom and accepted practice in international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials."). Significantly, neither declaration addressed the definition of harm contained in section 1.1(l), Pet. App. 67a-68a, of the new Clinton Order. Nor did either declaration attempt to identify or describe any harm that was reasonably likely to flow from the release of the information in the letter based on the sensitivity, value, or utility of the information as required by the Clinton Order.

On March 29, 1996, the district court granted Respondent's motion for summary judgment and ordered the letter released under FOIA. Pet. App. 29a – 42a. The district court first found that the letter did not meet the definition of "foreign government information" under section 1.1(d)(3) of the Clinton Order because there was no evidence that there was an expectation of confidentiality at the time the letter was sent to the United States. The district court noted:

> Neither DOJ [Justice] nor DOS [State] treated the letter as confidential at the time of receipt. Neither agency classified the letter until nearly a year after the subject FOIA request. Neither asserted an exemption until more than a year after the request, and then only at the request of Great Britain.

Pet. App. 35a.

The district court did find that the letter met the more general definition of information concerning "foreign relations or foreign activities of the United States" under section 1.5(d) of the Clinton Order, Pet. App. 71a, and therefore came within one of the categories eligible for classification. Pet. App. 35a. Turning to the specification of anticipated harm from disclosure, the district court applied the universally accepted procedure for FOIA litigation established by *Vaughn v. Rosen*, 484 F.2d 820, 826-28.

Pet. App. 31a (citing *Vaughn*, 484 F.2d at 826-28), 39a. Under that standard, the agency's proof in support of nondisclosure must, at a minimum, provide "a particularized explanation of how disclosure of [the] specific [information]" at issue would damage the interest protected by the exemption. Pet. App. 39a. This, in the district court's view, the Sheils Declaration did not do. Its general and conclusory assertions about the confidentiality of all government-to-government communications could not be sufficient, or else all "foreign government information" would automatically be exempt from disclosure and much of the Clinton Order's new requirements would be rendered surplusage. Pet. App. 41a. Moreover, the Sheils Declaration failed completely to address the definition of harm in the Clinton Order, which "place[d] the focus on the information disclosed, not the act of disclosing." Pet. App. 40a. Finally, the district court found that Justice and State had not made an adequate showing that certain portions of the letter were not segregable. Pet. App. 40a.

Defendants State and Justice filed a motion to alter or amend judgment and to have the district court examine the letter *in camera*. The Kennedy Declaration, Pet. App. 55a-59a, was submitted as "new evidence" in support of the motion. Pet. App. 22a-23a. The district court found that the Kennedy Declaration did little more than recite the same generalized concerns as the Sheils Declaration. App. 22a-23a.[8] Like the Sheils Declaration, the Kennedy Declaration relied upon a

[8] In fact, as the district court noted, the Kennedy Declaration's references to State's letter of inquiry to the British government regarding Respondent's FOIA request cut against their claims of categorical confidentiality. State's letter strongly suggested that State intended to release the letter absent British protest. *See* Pet. App. 22a-23a ("The letter of inquiry cuts against defendants' position. It suggests that DOS [State] intended to comply with the FOIA request and would have but for the U.K's opposition ('Before complying with this request, we would appreciate the concurrence of your government in the release of the document').").

longstanding custom and practice of confidentiality in diplomatic communications. While not disputing that such a tradition existed, or that the British had invoked it here, the district court quite properly looked to the text of the Clinton Order itself:

> There may be historical practices and protocols in diplomatic circles supportive of defendants' position, and probably are. In recognition of that history, Congress could have shielded all materials either generated or held by DOS [State] from FOIA disclosure, but chose instead to defer to the Executive Branch. The Executive Branch could have shielded all materials either generated or held by DOS [State] from FOIA disclosure, and for all practical purposes did so in 1982 when EO 12356 [Reagan Order] was signed. In 1995, the current administration eliminated the presumption of harm found in former EO 12356 § 1.3(c) and now requires a showing of harm on a case-by-case basis. EO 12958 § 1.2(a)(4) [Clinton Order]. This is a major shift in policy. Defendants might not view this evolution as prudent policy, but the answer is to direct their concerns to the President, not to ask courts to rewrite an executive order by inserting language the President pointedly deleted.

Pet. App. 25a.

Despite the fact that the district court rejected defendants' "new evidence" and further rejected their attempts to ignore or amend the text of the Clinton Order *pro tanto* through State Department declarations, the district court nonetheless granted reconsideration, inspected the letter *in camera*, and ordered the letter withheld. The district court was "unable to say why" the letter should be withheld, because, in its view, doing so would necessarily cause the harm sought to be avoided. Pet. App. 27a. Nor did the district court cite any of the standards of the Clinton Order

as a basis for reversing itself, Pet. App. 27a-28a, or make any specific findings as to segregability. *Id.*[9]

The United States Court of Appeals for the Ninth Circuit reversed and ordered the letter released. Pet. App. 1a-20a. The court of appeals found, as the district court had, that both of the possible harms discussed in the Sheils and Kennedy Declarations – "damage caused by the act of disclosing a letter between foreign governments, regardless of its particular contents, and damage caused because the letter concerns international extradition proceedings" Pet. App. 10a – were insufficient as a matter of law under the standards established by the Clinton Order. Thus, under the Clinton Order, "it is clear that *all* information exchanged between foreign governments is not exempt from FOIA disclosure, not even all information that another government prefers to keep confidential. . . ." Pet. App. 14a (emphasis in original). As the Ninth Circuit noted, the government was seeking essentially the same analysis as applied under the Reagan Order, arguing that harm to the national security should be presumed without any showing that disclosure of the specific information itself could be injurious. The Clinton Administration however, had "chose[n] to make it easier for the public to view material from foreign governments by eliminating the presumption of harm found in the prior Executive Order, EO 12356 § 1.3(c), and requiring the U.S. government to identify the particular damage that would result from releasing the information." Pet. App. 14a.

Nor could the Ninth Circuit accept the proposition that extradition communications were categorically exempted from disclosure. The court noted that State had been willing to release the letter prior to British resistance

[9] The district court simply stated that "there is no portion of [the letter] which could be disclosed without simultaneously disclosing injurious materials." Pet. App. 27a-28a. This "finding" was, of course, every bit as general and conclusory as the assertions of non-segregability by the government which the district court had previously rejected. *See* Pet. App. 40a.

and that the British Home Office itself had acknowledged a defense right to extradition letters upon proper request. Pet. App. 15a. This record hardly supported a categorical exception to the Clinton Order for extradition letters.

Finally, the Ninth Circuit rejected the proposition that it should defer to the withholding agencies' generalized allegations of possible harms. It noted that the burden rests with the government, consistent with well-settled FOIA precedent, to make an initial showing (the *Vaughn* showing) that a particular exemption applies to a particular document before deference is granted. Pet. App. 16a (citing *Rosenfeld v. Department of Justice*, 57 F.3d 803, 807 (9th Cir. 1995)). Under the Clinton Order that initial showing now required some identification or description of particular harm as defined in the order. Pet. App. 16a-17a.

The court of appeals conducted its own *in camera* review and, in doing so, expressly accorded deference to the government's characterization of the letter and potential harms from release. Pet. App. 17a. The court concluded:

> We have reviewed the letter *in camera*, and carefully considered its contents, including the "sensitivity, value, and utility" of the information contained therein. Having done so, we fail to comprehend how disclosing the letter at this time could cause "harm to the national defense or foreign relations of the United States." The letter is, to use Mr. Kennedy's term, "innocuous." Even after giving the act of classification the deference to which it is entitled, we are compelled to conclude that disclosure of the letter pursuant to Weatherhead's FOIA request could not reasonably "be expected to result in damage to the national security."

Pet. App. 17a (citations omitted in original).

Judge Silverman dissented. Pet. App. 18a-20a. He found the British insistence on confidentiality and the protocols recited in the Sheils and Kennedy declarations were sufficient to justify withholding the letter. Pet. App.

18a-19a. Judge Silverman's dissent did not identify or describe any specific harm flowing from the content of the letter, or dispute the majority's characterization of the letter as "innocuous." Rehearing and rehearing en banc were denied and this timely petition for certiorari followed.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision in this case did not and, in fact, could not create any conflict with the decisions of any other court of appeals. The Ninth Circuit's decision is the first court of appeals decision to apply FOIA Exemption 1 to the radical changes in the treatment of foreign government communications wrought by the Clinton Order. The Solicitor General's representation to this Court that the change is mere "happenstance," Pet. at 22, and "has no bearing on the conflict," *id.*, is disingenuous at best. That position conflicts with Executive Branch pronouncements contemporaneous with the promulgation of the Clinton Order and with the position taken by the government in the district court that the Reagan Order should be applied and, if applied, would be dispositive.

Nor did the Ninth Circuit fail to accord appropriate deference to the declarations filed in this case. Every circuit requires at least an initial showing under *Vaughn* that the specific document at issue falls within the particular exemption claimed. The Ninth Circuit simply applied this well-settled principle in the context of the Clinton Order's more stringent substantive criteria. The deference the government seeks – district court acquiescence to generalized assertions of possible harms – is inconsistent with the 1974 amendments to FOIA that overruled *Mink*, inconsistent with the requirements of *Vaughn*, and inconsistent with the new dictates of the government's own classification regime.

Nor is the Ninth Circuit's decision "flatly inconsistent," Pet. at 15, with any decisions of this Court. *Department of the Navy v. Egan*, 484 U.S. 518 (1988), held that the

Merit Systems Protection Board did not have jurisdiction over decisions regarding security clearances. *CIA v. Sims*, 471 U.S. 159 (1985), held that the National Security Act of 1947 qualified as a withholding statute under Exemption 3 of FOIA and that medical and psychological professionals conducting counterintelligence activities were protected "intelligence sources" under that Act. It strains credulity to claim that the result below conflicts with either of these decisions. Neither of these precedents speaks to FOIA Exemption 1, let alone Exemption 1 as applied under the Clinton Order. Moreover, because Exemption 1 leaves the Executive Branch in complete control of both the substantive and procedural aspects of classification, dire predictions of encroachment on Executive Branch prerogatives, Pet. at 14-18, ring hollow indeed. If the Clinton Order results in a chilling of diplomatic exchange because the decision to withhold each foreign government communication must be justified by identification and description of a particular harm, Pet. at 14, the remedy lies in amendment of the Executive Order. This Court should decline the invitation to judicially twist and bend both the FOIA and the Clinton Order to achieve the same protection as the Reagan Order. Rather, the Executive, which possesses both expertise in foreign affairs and political accountability, should simply amend its own order and accept whatever political consequences ensue.

The Ninth Circuit's ruling in this case is very specific to the facts of this case, and its decision will not result in any harm to the national security or Executive Branch prerogatives. Despite multiple opportunities to make a showing, the government has been unable to demonstrate that disclosure of the information in the letter at issue will cause any specific harm to national security. Thus, the situation presented here is unusual, because the Clinton Order clearly contemplates that a wholly "innocuous" communication like this one will not be classified. Nothing in the Ninth Circuit's ruling excludes the possibility that truly sensitive national security materials may be treated in a categorical manner even under the Clinton Order.

On the unique facts of this case, the court of appeals' decision requiring disclosure of this letter was a correct application of FOIA Exemption 1 under the terms of the Clinton Order. The court of appeals correctly rejected the argument that government-to-government diplomatic communications are categorically exempt from disclosure. The Clinton Order was promulgated to reverse precisely this type of categorical classification. Its text, structure, and accompanying signing statement all confirm that intent. The Ninth Circuit was also correct to reject the argument that extradition communications as a category should be exempted from disclosure. As the British Home Office noted, such communications are routinely turned over to the defense upon request. They often place limitations on extradition that must be communicated to a state or federal court under the doctrine of specialty and other doctrines. Moreover, as the Ninth Circuit noted, it is difficult for the government to argue that this letter falls into a well-established categorical exception when both Justice and State failed to "recognize" its classified nature until after a FOIA request and after consultation with the British government. Nor can this "innocuous" letter, pertaining to an extradition almost five years ago, satisfy the Clinton Order's stringent definition of harm to the national security.

Finally, this case is particularly unsuited for this Court's review. Even if the Court were wont to examine the issues raised by the Clinton Order's interaction with FOIA Exemption 1, this case presents a poor vehicle for doing so. The *post hoc* classification decision in this case, the apparent willingness of Justice and State to release the letter prior to British protest, and the district court's conclusion that the letter was not exchanged with a promise of confidentiality sufficient to qualify it as "foreign government information," are unique facts that render this case an unsuitable vehicle to address the proper interpretation of the new Clinton Order.

ARGUMENT

A. The Decision Below Does Not Conflict With the Decisions of This Court or Other Courts of Appeal.

In a strained attempt to mold this case to the criteria for the exercise of this Court's certiorari jurisdiction, the government argues that the decision below conflicts with four decisions of other courts of appeals. A conflict, however, is quite simply impossible – all of the cited cases predate the Clinton Order which, as previously discussed at length, *supra* pp. 6-7, substantially increased the burden the Executive Branch placed upon itself to justify the classification of diplomatic communications. Indeed, several of the cases cited by the government rely upon the presumption of harm contained in the Reagan Order – a presumption that was expressly eliminated by the Clinton Order. Even a passing examination of these cases reveals that they apply the same legal principles as did the Ninth Circuit – they simply apply them to very different facts under a very different executive order. Thus, the Ninth Circuit's decision creates no potential for the forum shopping or inconsistent results decried by the Solicitor General. Pet. at 14.

In *Jones v. FBI*, 41 F.3d 238 (6th Cir. 1994), the court of appeals addressed a FOIA request for all FBI records pertaining to a Black-nationalist group active in Cleveland in the 1960s and 1970s. The district court applied *Vaughn v. Rosen*, requiring the FBI to provide a description and claim of exemption specific enough to allow judicial evaluation of the claim. *Jones*, 41 F.3d at 242. The court found that the affidavits filed by the FBI "are of the kind that have become accepted practice and they are sufficiently detailed" to satisfy the *Vaughn* standard. *Id.* The court specifically upheld an Exemption 1 claim under the Reagan Order, allowing redaction of "intelligence activities [,] . . . sources, or methods," pursuant to section 1.3(a)(4) of the Reagan Order. Resp. App. 7a. Of course, under the

Reagan Order, as applied in *Jones*, disclosure of "intelligence sources or methods" was *presumed* to cause damage to the national security. Resp. App. 7a. Thus, *Jones* properly accorded deference where the initial specificity required by *Vaughn* had been satisfied in a case involving intelligence sources under an executive order that presumed damage to the national security. *Jones* tells us literally nothing about how the Sixth Circuit would approach a foreign government communication case under the Clinton Order, with no presumption of harm, and with general and conclusory government declarations that do not satisfy *Vaughn*.

McDonnell v. United States, 4 F.3d 1227, 1243 (3d Cir. 1993), is equally unavailing in establishing a conflict among the circuits. *McDonnell* also involved an Exemption 1 claim under the Reagan Order based on intelligence methods – in that case, cryptographic systems. As did the Ninth Circuit here, the Third Circuit in *McDonnell* emphasized the importance to the adversarial process under FOIA of detailed and specific *Vaughn* affidavits. "Thus, when an agency seeks to withhold information, it must provide 'a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.' " *McDonnell*, 4 F.3d at 1241 (quoting *King v. Department of Justice*, 830 F.2d 210, 218-19 (D.C. Cir. 1987)). Once this required showing under *Vaughn* had been made, the Third Circuit properly deferred to a detailed FBI affidavit discussing the potential harms caused by release of encrypted FBI messages. *McDonnell*, 4 F.3d at 1243-45. The Sixth Circuit's approach in *McDonnell* is indistinguishable from that of the court below. Like the Ninth Circuit (and every other circuit) the *McDonnell* court required an "initial showing" of some specificity under *Vaughn* before deferring to the Executive's classification decision.

Krikorian v. Department of State, 984 F.2d 461 (D.C. Cir. 1993), upheld the State Department's refusal to release communications from foreign governments regarding

Armenian terrorism. The opinion explicitly relies in part upon the Reagan Order's presumption that the release of foreign government communications would harm the national security. *See Krikorian*, 984 F.2d at 465 & n.4 (discussing "reciprocal confidentiality" of diplomatic communications and citing presumption of harm from release under section 1.3(c) of the Reagan Order). We are left to speculate as to how the D.C. Circuit's decision in *Krikorian* "conflicts" in any sense with the Ninth Circuit's decision under a new and different executive order without such a presumption.

Finally, *Bowers v. Department of Justice*, 930 F.2d 350 (4th Cir.), *cert. denied*, 502 U.S. 911 (1991), involved a request by a journalist for the FBI files of a former Soviet diplomat and a Soviet national who emigrated to the United States. Again, the court specifically relied upon the presumption of harm in the Reagan Order in denying disclosure of foreign government information. *Id.* at 358. The court also noted that it had been provided with "more than 480 pages of declarations" which provided "a very detailed and particularized account of why the withheld information qualified under the exemptions of § 552(b)." *Id.* at 357.[10]

As the above discussion makes clear, there is no conflict in approach or analysis between the Ninth Circuit's decision in this case and the decisions of other courts of appeals. Pursuant to *Vaughn* and consistent with the

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[10] Nor do *Miller v. Department of State*, 779 F.2d 1378 (8th Cir. 1985), or *Doherty v. Department of Justice*, 775 F.2d 49 (2d Cir. 1985), conflict with the decision below. Both cases are decided under the Reagan Order, and both cases deferred to the Executive's classification decision only *after* an adequately specific claim of exemption had been made. *Miller*, 779 F.2d at 1387 ("[T]he government cannot adequately carry its burden through 'barren assertions' that the document is exempt.") (citations omitted); *Doherty*, 775 F.2d at 51 (The affidavits "describe with reasonable specificity the information withheld and the justifications for nondisclosure.") (citation omitted).

FOIA's requirements that the government bear the burden of proof on exemptions, every circuit requires an "initial showing" of some specificity that a particular document falls within the terms of Exemption 1.[11] No circuit defers to the kind of general and conclusory declarations such as those filed in this case, even under the Reagan Order. Such deference would read the 1974 amendments out of the statute and reinstate the *Mink* regime.

The government's claim that the decision below conflicts with this Court's decisions in *Egan* and *Sims* is even more attenuated. *Egan* found that the statutory authority of the Merit Systems Protection Board did not extend to review of agency decisions to revoke security clearances. In so holding, the Court applied the canon of construction that "unless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530 (citations omitted). Because the Board had no express grant of authority to review security clearance revocation, the Court found that Congress had conferred no such authority. *Id.* at 531-32.

Egan is wholly inapposite here. In FOIA, Congress has clearly and unambiguously given the federal courts jurisdiction to review *de novo* whether matters are "properly classified" pursuant to executive order. 5 U.S.C. § 552(b)(1)(B). The Executive controls entirely the content of his own orders. No affront to Article II prerogatives is presented by requiring the Executive to adhere to standards of his own creation in the area of foreign affairs.

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[11] For a discussion of the history of Exemption 1, *see supra* p. 3. Given its centrality to FOIA exemption litigation, it is passing strange that *Vaughn* is nowhere mentioned in the petition for certiorari. The fact that under *Vaughn*, federal courts have required an "initial showing" of some specificity before deferring to agency claims of exemption for over 25 years would seem extremely relevant to this Court's evaluation of the Ninth Circuit's requirement of an "initial showing" in this case.

Nor does this Court's decision in *Sims* require review of the decision below. *Sims* was an Exemption 3 case applying the National Security Act to intelligence sources. The court held that the "broad sweep" of the Act allowed the Director of the CIA to protect all sources of intelligence for the Agency, whether or not they are foreign sources or otherwise confidential or nonpublic. *Sims*, 471 U.S. at 169-70. No Exemption 1 claim was raised or litigated in *Sims*. *See id.* at 187-88 & n.4 (Marshall, J., dissenting).

Respondent does not quarrel with the general principle endorsed in *Egan* and *Sims* that the Executive Branch is entitled to deference from the other two Branches concerning its decisions in the areas of foreign affairs and national security. The point here is that the Executive has made such a decision in the Clinton Order – he has revised classification policy to emphasize disclosure and de-emphasize secrecy. It is that judgment that the Judicial Branch is required to enforce under FOIA Exemption 1, not the *post hoc* rationalizations of State Department personnel who may disagree with that judgment.

While the Ninth Circuit is the first court to apply the Clinton Order under FOIA Exemption 1, several courts have noted that it embodies a conscious decision by the Executive Branch to substantially reduce the secrecy accorded to government information and increase its disclosure. *See, e.g., Summers v. Department of Justice*, 140 F.3d 1077, 1082 (D.C. Cir. 1998) ("The newer order, Executive Order No. 12,958, differs considerably from its predecessor, Executive Order No. 12,356. Significantly, the newer order is less restrictive, reflecting what it refers to as 'dramatic changes' in national security concerns in the late 1980s following the United States' victory in the Cold War."); *Halpern v. FBI*, No. 98-6035, 1999 U.S. App. LEXIS 13700 (2d Cir. June 22, 1999), at *18 (noting "more liberal standards of Executive Order 12,958"). Indeed, in both this case and *Halpern*, the Department of Justice actively litigated for application of the more restrictive standards of the Reagan Order. *See* Pet. App. 26a-27a, *Halpern*, at

*18-*19.[12] It is baffling that the government now represents to this Court that the changes wrought by the new order are mere "happenstance," Pet. at 22, immaterial to the outcome of Exemption 1 litigation.

B. The Ninth Circuit Correctly Interpreted and Applied the New and Significantly More Stringent Requirements For Classification in the Clinton Executive Order.

The court of appeals quite properly rejected the rule of blanket deference urged upon it by the government. The thrust of the government's legal arguments below, its State Department declarations, and its position before this Court is that foreign government communications must be categorically protected to ensure full and candid exchange with foreign governments. Pet. App. 53a (Sheils Declaration); Pet. App. 57a (Kennedy Declaration); Pet. at 14, 24-25. Thus, the government seeks to resurrect, through State Department declarations and "serious separation-of-powers concerns," Pet. at 17-18, the presumption of protection for government-to-government communications it expressly cast aside in 1995.

The Ninth Circuit would not take the bait and neither should this Court. The change in executive orders could not be clearer nor more deliberate. As previously outlined at length, *supra* pp. 6-7, a presumption of harm was eliminated and in its place the Clinton Order erects a requirement that specific harm be identified and described. The structure of the order makes crystal clear that breach of a promise of confidentiality alone cannot, as a matter of law, satisfy the harm requirement. An expectation of confidentiality is a necessary predicate to a finding that information qualifies as "foreign government information" eligible

[12] *See also* Defendants' Reply Memorandum in Support of Motion to Alter or Amend Judgment Pursuant to Rule 59(e), at 8-9 & n.2 (citing presumption in Reagan Order).

for classification. If a showing of expectation of confidentiality is also sufficient for classification, then section 1.2(a)(4) of the Clinton Order is rendered surplusage in the case of "foreign government information" and the Clinton Order is at least as restrictive as the Reagan Order. The Ninth Circuit was undoubtedly correct in rejecting this circular line of reasoning. The government's position – that a backdrop of diplomatic confidentiality, or even a particular government's *post hoc* insistence on confidentiality, is sufficient ground for classification under the Clinton Order – is untenable.[13]

The Ninth Circuit was also correct in rejecting the government's argument that extradition communications constitute a particularly sensitive subset of diplomatic communications for which a presumption of harm should apply. Such an approach is inconsistent with the Clinton Order's elimination of the presumption of protection for all diplomatic communications. *Compare* Reagan Order § 1.3(b) Resp. App. 7a *with* Clinton Order § 1.2(a)(4), Pet. App. 68a. President Clinton's signing statement accompanying the new executive order makes clear that "[c]lassifiers will have to justify what they classify" and "we will no longer presumptively classify certain categories of information, whether or not the *specific information* otherwise meets the strict criteria for classification." Resp. App. 27a (emphasis added). The President's statement comports

[13] Nor is the State Department's (or the Solicitor General's) interpretation of the Clinton Order entitled to any deference. *See* Pet. at 23 & n.11 (citing *Udall v. Tallman*, 380 U.S. 1, 4 (1965)). *Udall* involved a long-standing construction which was a matter of public record. *Id.* By contrast, Justice and State's position here was taken for the first time in litigation and is not entitled to any deference. *See Martin v. OSHRC*, 499 U.S. 144, 156 (1991).

with the text of the order and makes clear that a categorical or presumptive approach to diplomatic communications based on expectations of confidentiality is precisely – *precisely* – what the order was meant to eliminate.[14]

Furthermore, extradition documents are uniquely poor candidates for a categorical exception to disclosure. Criminal defendants routinely have access to, and rely upon, foreign government documents to enforce important doctrines of international extradition law in state and federal courts. For example, "[a]s a matter of international comity, the doctrine of specialty prohibits the requesting nation from prosecuting the extradited individual for any offense other than that for which the surrendering state agreed to extradite." *United States v. Khan*, 993 F.2d 1368, 1373 (9th Cir. 1993) (citations omitted); *see also United States v. Rauscher*, 119 U.S. 407, 419-21 (1886). Extradition Treaty, June 8, 1972, U.S.-U.K., art. XII(1), 28 U.S.T. 227, 233, T.I.A.S. No. 8468 (recognizing doctrine of specialty). The specialty doctrine thus focuses exclusively upon the terms and conditions of a foreign government's grant of the United States' extradition request. United States courts routinely enforce these "diplomatic" limitations on extradition. *See, e.g., Khan*, 993 F.2d at 1373-75 (prohibiting prosecution where Pakistani extradition documents did not unambiguously permit such prosecution). Access to

[14] As a statement of intent and purpose by the unitary and exclusive source of the Clinton Order itself, the President's signing statement is entitled to significantly more interpretive weight in this context than in the context of legislation. At a minimum, it should be accorded the same weight as a preamble to legislation. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 830 (1995); *Price v. Forrest*, 173 U.S. 410, 427 (1899). In addition to the signing statement, the preamble to the Clinton Order speaks in the same terms of increased access and more stringent criteria for classification. Pet. App. 26a-28a. As contemporaneous statements of presidential purpose, both the signing statement and preamble should inform judicial interpretation of the text of the order.

extradition documents is thus often necessary to enforce treaties as they impact the prosecution of foreign nationals. Indeed, in this very case, the British government informed the United States that Great Britain did not have an analogous crime for the firearms charges in the indictment against Croft. This information was conveyed to the trial judge in this case, and that charge was severed and not tried.[15]

In addition, the First Amendment dictates that preliminary hearings in criminal cases are presumptively open to the public. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). As this Court has noted, public access plays a significant positive role in the functioning of preliminary criminal proceedings, by "enhanc[ing] both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Id.* at 508. This principle applies with equal force to extradition hearings and foreign extradition documents. *See In re Romeo*, No. 87-0808RC, 1987 U.S. Dist. LEXIS 12595 (D. Mass. May 1, 1987). Not only does the public have an interest in open extradition proceedings within the context of the criminal justice system; "the extent to which and the manner in which the Executive Branch adheres to its treaty obligations is a matter of legitimate public concern." *Id.* at *9 (citing *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986)). Thus, unlike many diplomatic communications, extradition communications are often destined for release to the courts and criminal defendants and this fact is known to (and desired by) the governments that exchange them. Thus, the Ninth Circuit correctly rejected a categorical rule exempting extradition communications from disclosure under the FOIA.

[15] If this information regarding "specialty" was contained in the July 28, 1994, letter at issue in this case, there can be no argument that, at a minimum, the portion of the letter addressing specialty must be disclosed.

Contrary to the discussion in the petition, Pet. at 26-29, the Ninth Circuit nowhere held that only harm flowing from the disclosure of the content of information, as opposed to harm from the act of disclosure itself, is cognizable under the Clinton Order. Rather, the court of appeals expressly left open the question whether a categorical approach is forbidden for all categories of classifiable material under the Clinton Order: "While we do not preclude the possibility that the government might be able in some circumstance to establish an inherently damaging category of information, we need not decide that question now, because the government did not meet its burden of establishing the justification for such a category in this case." Pet. App. 14a-15a. Thus, the Ninth Circuit's opinion stands only for the narrow proposition that the release of "government-to-government communications" or "extradition communications" cannot categorically be presumed to cause harm to the national security. Given the changes wrought by the Clinton Order, this holding is undoubtedly correct. Nowhere does the Ninth Circuit purport to limit all cognizable harms to those flowing exclusively from disclosure of the contents of a particular document.[16]

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[16] Although this broader issue was not passed upon by the Ninth Circuit, and is therefore not properly presented by this case, the district court did squarely hold, we believe correctly, that the Clinton Order restricts classification harm to damage from the disclosure of the content of information. The Clinton Order eliminated the "mosaic" theory of classification by deleting that portion of the Reagan Order that permitted classification based on harm from unauthorized disclosure of information "either by itself or in the context of other information." Resp. App. 7a. *Compare* Reagan Order § 1.3(b), Resp. App. 7a. *with* Clinton Order § 1.2(a)(4), Pet. App. 68a. Harm from exogenous context, therefore, can no longer provide grounds for classification. Harm must flow from the disclosure of "information, to include the sensitivity, value, and utility of that information." Pet. App. 68a. While "sensitivity, value, and utility," are not exclusive, they nonetheless must be read in the context of the doctrine of *ejusdem generis*. *See, e.g., Arcadia v. Ohio Power Co.*, 498 U.S. 73, 84 (1990); *Cleveland v. United States*, 329 U.S. 14, 18 (1946). All three of these listed "sources" of harm relate exclusively to the content of the information. Moreover, the President's signing statement states unequivocally that the new order focuses on "whether or not *the specific information* otherwise meets the strict standards for classification." Resp. App. 27a (emphasis added). Still, while the Solicitor General is quite mistaken in his reading of the Clinton Order, resolution of this issue is not necessary to this case and therefore must await further litigation applying FOIA Exemption 1 to the Clinton Order.

Finally, the Ninth Circuit held that nothing extraordinary about the content or context of this document justified withholding it under Exemption 1: "We have reviewed the letter *in camera*, and carefully considered its contents, including the 'sensitivity, value, and utility' of the information contained therein. The letter is, to use Mr. Kennedy's term, 'innocuous.' " Pet. App. 17a (quoting Clinton Order § 1.1(l)), Pet. App 67a-68a. The letter pertains to a criminal case now final for several years.[17] The fact that the British wish the letter to remain confidential is plainly not sufficient, in and of itself, to satisfy the government's burden under the Clinton Order. This Court's review is clearly not warranted simply to examine or correct the conclusion of the Ninth Circuit based upon its *in camera* review of one document.

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[17] We note that even Judge Silverman, the dissenting judge below, who also viewed the letter *in camera*, could not see any harm in disclosure. "I am not a diplomat, I don't know the intricacies of the geopolitical situation at the time, but I looked at the letter today and, honestly looking at it, I can't tell what it is that makes it top secret." Transcript of Oral Argument, *Weatherhead v. United States*, No. 96-36260 (9th Cir. Apr. 8, 1998), at 34 (Statement of Judge Silverman).

C. This Case Constitutes a Poor Vehicle To Address the Issues Raised in the Petition.

The unique facts of this case make it a poor vehicle for the announcement of any general principles of FOIA law or to address the interaction of the new Clinton Order with FOIA Exemption 1. First, the district court found that this letter did not qualify as "foreign government information" because it was not exchanged with an expectation of confidentiality. Pet. App. 33a ("There is no showing in this record of a contemporaneous expectation of confidentiality with respect to the letter."). Second, the case involves extradition communications, which are *sui generis* in the field of diplomatic exchange in that they are often intended (or required) to be revealed to the courts of requesting and extraditing countries. Third, it appears that a portion of this letter has already been revealed to a federal district court in Oregon to effectuate the British assertion of the doctrine of specialty. Finally, the fact that this document was not classified until almost a year after a FOIA request was made, may color the analysis. *See* Pet. App. 76a (placing certain additional restrictions on classification decisions made after receipt of a FOIA request).

CONCLUSION

Because the Ninth Circuit is the first court of appeals in the nation to apply the Clinton Order under FOIA Exemption 1, because it was undoubtedly correct in refusing to erect categorical presumptions for diplomatic communications under the new Clinton Order, and because the facts of this case present a poor vehicle for review, the petition for certiorari should be denied.

Respectfully submitted,

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Executiver [sic] Order National Security Information

This Order prescribes a uniform system for classifying, declassifying, and safeguarding national security information. It recognizes that it is essential that the public be informed concerning the activities of its Government, but that the interests of the United States and its citizens require that certain information concerning the national defense and foreign relations be protected against unauthorized disclosure. Information may not be classified under this Order unless its disclosure reasonably could be expected to cause damage to the national security.

Now, by the authority vested in me as President by the Constitution and laws of the United States of America, it is hereby ordered as follows:

Part 1 Original Classification

Section 1.1 Classification Levels.

(a) National security information (hereinafter "classified information") shall be classified at one of the following three levels:

(1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security.

(b) Except as otherwise provided by statute, no other terms shall be used to identify classified information.

(c) If there is reasonable doubt about the need to classify information, it shall be safeguarded as if it were classified pending a determination by an original classification authority, who shall make this determination within thirty (30) days. If there is reasonable doubt about the appropriate level of classification, it shall be safeguarded at the higher level of classification pending a

determination by an original classification authority, who shall make this determination within thirty (30) days.

Sec. 1.2 Classification Authority.

(a) Top Secret. The authority to classify information originally as Top Secret may be exercise [sic] only by:

(1) the President;

(2) agency heads and officials designated by the President in the Federal Register; and

(3) officials delegated this authority pursuant to Section 1.2(d).

(b) Secret. The authority to classify information originally as Secret may be exercised only by:

(1) agency heads and officials designated by the President in the Federal Register;

(2) officials with original Top Secret classification authority; and

(3) officials delegated such authority pursuant to Section 1.2(d).

(c) Confidential. The authority to classify information originally as Confidential may be exercised only by:

(1) agency heads and officials designated by the President in the Federal Register;

(2) officials with original Top Secret or Secret classification authority; and

(3) officials delegated such authority pursuant to Section 1.2(d).

(d) Delegation of Original Classification Authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this Order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) Original Top Secret classification authority may be delegated only by the President; an agency head or official designated pursuant to Section 1.2(a)(2); and the senior official designated under Section 5.3(a)(1), provided that official has been delegated original Top Secret classification authority by the agency head.

(3) Original Secret classification authority may be delegated only by the President; an agency head or official designated pursuant to Sections 1.2(a)(2) and 1.2(b)(1); an official with original Top Secret classification authority; and the senior official designated under Section 5.3(a)(1), provided that official has been delegated original Secret classification authority by the agency head.

(4) Original Confidential classification authority may be delegated only by the President; an agency head or official designated pursuant to Section 1.2(a)(2), 1.2(b)(1) and 1.2(c)(1); an official with original Top Secret classification authority; and the senior official designated under Section 5.3(a)(1), provided that official has been delegated original classification authority by the agency head.

(5) Each delegation of original classification authority shall be in writing and the authority shall not be

redelegated except as provided in this Order. It shall identify the official delegated the authority by name or position title. Delegated classification authority includes the authority to classify information at the level granted and lower levels of classification.

(e) Exceptional Cases. When an employee, contractor, licensee, or grantee of an agency that does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this Order and its implementing directives. The information shall be transmitted promptly as provided under this Order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within thirty (30) days whether to classify this information. If it is not clear which agency has classification responsibility for this information, it shall be sent to the Director of the Information Security Oversight Office. The Director shall determine the agency having primary subject matter interest and forward the information, with appropriate recommendations, to that agency for a classification determination.

Sec. 1.3 Classification Categories.

(a) Information shall be considered for classification if it concerns:

(1) military plans, weapons, or operations;

(2) the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;

(3) foreign government information;

(4) intelligence activities (including special activities), or intelligence sources or methods;

(5) foreign relations or foreign activities of the United States;

(6) scientific, technological, or economic matters relating to the national security;

(7) United States Government programs for safeguarding nuclear materials of facilities;

(8) cryptology;

(9) a confidential source; or

(10) other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President. Any determination made under this subsection shall be reported promptly to the Director of the Information Security Oversight Office.

(b) Information that is determined to concern one or more of the categories in Section 1.3(a) shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

(c) Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security.

(d) Information classified in accordance with Section 1.3 shall not be declassified automatically as a result of any unofficial publication or inadvertent or unauthorized disclosure in the United States or abroad of identical or similar information.

Sec. 1.4. Duration of Classification.

(a) Information shall be classified as long as required by national security considerations. When it can be determined, a specific date or event for declassification shall be set by the original classification authority at the time the information is originally classified.

(b) Automatic declassification determinations under predecessor orders shall remain valid unless the classification is extended by an authorized official of the originating agency. These extensions may be by individual documents or categories of information. The agency shall be responsible for notifying holders of the information of such extensions.

(c) Information classified under predecessor orders and marked for declassification review shall remain classified until reviewed for declassification under the provisions of this Order.

Sec. 1.5 Identification and Markings.

(a) At the time of original classification, the following information shall be shown on the face of all classified documents, or clearly associated with other forms of classified information in a manner appropriate to the medium involved, unless this information itself would reveal a confidential source or relationship not otherwise evident in the document or information:

(1) one of the three classification levels defined in Section 1.1;

(2) the identity of the original classification authority if other than the person whose name appears as the approving or signing official;

(3) the agency and office of origin; and

(4) the date or event for declassification, or the notation "Originating Agency's Determination Required."

(b) Each classified document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, and which portions are not classified. Agency heads may, for good cause, grant and revoke waivers of this requirement for specified classes of documents or information. The Director of the Information Security Oversight Office shall be notified of any waivers.

(c) Marking designations implementing the provisions of this Order, including abbreviations, shall conform to the standards prescribed in implementing directives issued by the Information Security Oversight Office.

(d) Foreign government information shall either retain its original classification or be assigned a United States classification that shall ensure a degree of protection at least equivalent to that required by the entity that furnished the information.

(e) Information assigned a level of classification under predecessor orders shall be considered as classified at that level of classification despite the omission of other

required markings. Omitted markings may be inserted on a document by the officials specified in Section 3.1(b).

Sec. 1.6 Limitations on Classification.

(a) In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security.

(b) Basic scientific research information not clearly related to the national security may not be classified.

(c) The President or an agency head or official designated under Sections 1.2(a)(2), 1.2(b)(1), or 1.2(c)(1) may reclassify information previously declassified and disclosed if it is determined in writing that (1) the information requires protection in the interest of national security; and (2) the information may reasonably be recovered. These reclassification actions shall be reported promptly to the Director of the Information Security Oversight Office.

(d) Information may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of this Order (Section 3.4) if such classification meets the requirements of this Order and is accomplished personally and on a document-by-document basis by the agency head, the deputy agency head, the senior agency official designated under Section 5.3(a)(1), or an official with original Top Secret classification authority.

Part 2 Derivative Classification

Sec. 2.1 Use of Derivative Classification.

(a) Derivative classification is (1) the determination that information is in substance the same as information currently classified, and (2) the application of the same classification markings. Persons who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

(b) Persons who apply derivative classification markings shall:

(1) observe and respect original classification decisions; and

(2) carry forward to any newly created documents any assigned authorized markings. The declassification date or event that provides the longest period of classification shall be used for documents classified on the basis of multiple sources.

Sec. 2.2 Classification Guides.

(a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information.

(b) Each guide shall be approved personally and in writing by an official who:

(1) has program or supervisory responsibility over the information or is the senior agency official designated under Section 5.3(a)(1); and

(2) is authorized to classify information originally at the highest level of classification prescribed in the guide.

(c) Agency heads may, for good cause, grant and revoke waivers of the requirement to prepare classification guides for specified classes of documents or information. The Director of the Information Security Oversight Office shall be notified of any waivers.

Part 3. Declassification and Downgrading

Sec. 3.1 Declassification Authority.

(a) Information shall be declassified or downgraded as soon as national security considerations permit. Agencies shall coordinate their review of classified information with other agencies that have a direct interest in the subject matter. Information that continues to meet the classification requirements prescribed by Section 1.3 despite the passage of time will continue to be protected in accordance with this Order.

(b) Information shall be declassified or downgraded by the official who authorized the original classification, if that official is still serving in the same position; the originator's successor; a supervisory official of either; or officials delegated such authority in writing by the agency head or the senior agency official designated pursuant to Section 5.3(a)(1).

(c) If the Director of the Information Security Oversight Office determines that information is classified in violation of this Order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may

be appealed to the National Security Council. The information shall remain classified, pending a prompt decision on the appeal.

(d) The provisions of this Section shall also apply to agencies that, under the terms of this Order, do not have original classification authority, but that had such authority under predecessor orders.

Sec. 3.2 Transferred Information.

(a) In the case of classified information transferred in conjunction with a transfer of functions, and not merely for storage purposes, the receiving agency shall be deemed to be the originating agency for purposes of this Order.

(b) In the case of classified information that is not officially transferred as described in Section 3.2(a), but that originated in an agency that has ceased to exist and for which there is no successor agency, each agency in possession of such information shall be deemed to be the originating agency for purposes of this Order. Such information may be declassified or downgraded by the agency in possession after consultation with any other agency that has an interest in the subject matter of the information.

(c) Classified information accessioned into the National Archives of the United States shall be declassified or downgraded by the Archivist of the United States in accordance with this order, the directives of the Information Security Oversight office, and agency guidelines.

Sec. 3.3 Systematic Review for Declassification.

(a) The Archivist of the United States shall, in accordance with procedures and timeframes prescribed in the Information Security Oversight Office's directives implementing this Order, systematically review for declassification or downgrading (1) classified records accessioned into the National Archives of the United States, and (2) classified presidential papers or records under the Archivist's control. Such information shall be reviewed by the Archivist for declassification or downbrading [sic] in accordance with systematic review guidelines that shall be provided by the head of the agency that originated the information, or in the case of foreign government information, by the Director of the Information Security Oversight Office in consultation with interested agency heads.

(b) Agency heads may conduct internal systematic review programs for classified information originated by their agencies contained in records determined by the Archivist to be permanently valuable but that have not been accessioned into the National Archives of the United States.

(c) After consultation with affected agencies, the Secretary of Defense may establish special procedures for systematic review for declassification of classified crytologic [sic] information, and the Director of Central Intelligence may establish special procedures for systematic review for declassification of classified information pertaining to intelligence activities (including special activities), or intelligence sources or methods.

Sec. 3.4 Mandatory Review for Declassification.

(a) Except as provided in Section 3.4(b), all information classified under this Order or predecessor orders shall be subject to a review for declassification by the originating agency, if:

(1) the request is made by a United States citizen or permanent resident alien, a federal agency, or a State or local government; and

(2) the request describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort.

(b) Information originated by a President, the White House Staff, by committees, commissions, or boards appointed by the President, or others specifically providing advice and counsel to a President or acting on behalf of a President is exempted from the provisions of Section 3.4(a). The Archivist of the United States shall have the authority to review, downgrade and declassify information under the control of the Administrator of General Services or the Archivist pursuant to sections 2107, 2107 note, or 2203 of title 44, United States Code. Review procedures developed by the Archivist shall provide for consultation with agencies having primary subject matter interest and shall be consistent with the provisions of applicable laws or lawful agreements that pertain to the respective presidential papers or records. Any decision by the Archivist may be appealed to the Director of the Information Security Oversight Office. Agencies with primary subject matter interest shall be notified promptly of the Director's decision on such appeals and may further

appeal to the National Security Council. The information shall remain classified pending a prompt decision on the appeal.

(c) Agencies conducting a mandatory review for declassification shall declassify information no longer requiring protection under this Order. They shall release this information unless withholding is otherwise authorized under applicable law.

(d) Agency heads shall develop procedures to process requests for the mandatory review of classified information. These procedures shall apply to information classified under this or predecessor orders. They shall also provide a means for administratively appealing a denial of a mandatory review request.

(e) The Secretary of Defense shall develop special procedures for the review of cryptologic information, and the Director of Central Intelligence shall develop special procedures for the review of information pertaining to intelligence activities (including special activities), or intelligence sources or methods, after consultation with affected agencies. The Archivist shall develop special procedures for the review of information accessioned into the National Archives of the United States.

(f) In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of this Order:

(1) An agency shall refuse to confirm or deny the existence or non-existence of requested information whenever the fact of its existence or non-existence is itself classifiable under this Order.

(2) When an agency receives any request for documents in its custody that were classified by another agency, it shall refer copies of the request and the requested documents to the originating agency for processing, and may, after consultation with the originating agency, inform the requester of the referral. In cases in which the originating agency determines in writing that a response under Section 3.4(f)(1) is required, the referring agency shall respond to the requester in accordance with that Section.

Part 4 Safeguarding

Sec. 4.1 General Restrictions on Access.

(a) A person is eligible for access to classified information provided that a determination of trustworthiness has been made by agency heads or designated officials and provided that such access is essential to the accomplishment of lawful and authorized Government purposes.

(b) Controls shall be established by each agency to ensure that classified information is used, processed, stored, reproduced, transmitted, and destroyed only under conditions that will provide adequate protection and prevent access by unauthorized persons.

(c) Classified information shall not be disseminated outside the executive branch except under conditions that ensure that the information will be given protection equivalent to that afforded within the executive branch.

(d) Except as provided by directives issued by the President through the National Security Council, classified information originating in one agency may not be disseminated outside any other agency to which it has been made available without the consent of the originating agency. For purposes of this section, the Department of Defense shall be considered one agency.

Sec. 4.2 Special Access Programs.

(a) Agency heads designated pursuant to Section 1.2(a) may create special access programs to control access, distribution, and protection of particularly sensitive information classified pursuant to this Order or predecessor orders. Such programs may be created or continued only at the written direction of these agency heads. For special access programs pertaining to intelligence activities (including special activities but not including military operational, strategic and tactical programs), or intelligence sources or methods, this function will be exercised by the Director of Central Intelligence.

(b) Each agency head shall establish and maintain a system of accounting for special access programs. The Director of the Information Security Oversight Office, consistent with the provisions of Section 5.2(b)(4), shall have non-delegable access to all such accountings.

Sec. 4.3 Access by Historical Researchers and Former Presidential Appointees.

(a) The requirement in Section 4.1(a) that access to classified information may be granted only as is essential

to the accomplishment of authorized and lawful Government purposes may be waived as provided in Section 4.3(b) for persons who:

(1) are engaged in historical research projects, or

(2) previously have occupied policy-making positions to which they were appointed by the President.

(b) Waivers under Section 4.3(a) may be granted only if the originating agency:

(1) determines in writing that access is consistent with the interest of national security;

(2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this Order; and

(3) limits the access granted to former presidential appointees to items that the person originated, reviewed, signed, or received while serving as a presidential appointee.

Part 5 Implementation and Review

Sec. 5.1 Policy Direction.

(a) The National Security Council shall provide overall policy direction for the information security program.

(b) The Administrator of General Services shall be responsible for implementing and monitoring the program established pursuant to this Order. The Administrator shall delegate the implementation and monitorship

functions of this program to the Director of the Information Security Oversight Office.

Sec. 5.2 Information Security Oversight Office.

(a) The Information Security Oversight Office shall have a full-time Director appointed by the Administrator of General Services subject to approval by the President. The Director shall have the authority to appoint a staff for the office.

(b) The Director shall:

(1) develop, in consultation with the agencies, and promulgate, subject to the approval of the National Security Council, directives for the implementation of this Order, which shall be binding on the agencies;

(2) oversee agency actions to ensure compliance with this Order and implementing directives;

(3) review all agency implementing regulations and agency guidelines for systematic declassification review. The Director shall require any regulation or guideline to be changed if it is not consistent with this Order or implementing directives. Any such decision by the Director may be appealed to the National Security Council. The agency regulation or guideline shall remain in effect pending a prompt decision on the appeal;

(4) have the authority to conduct on-site reviews of the information security program of each agency that generates of [sic] handles classified information and to require of each agency those reports, information, and other cooperation that may be necessary to fulfill the Director's responsibilities. If these reports, inspections, or

access to specific categories of classified information would pose an exceptional national security risk, the affected agency head or the senior official designated under Section 5.3(a)(1) may deny access. The Director may appeal denials to the National Security Council. The denial of access shall remain in effect pending a prompt decision on the appeal;

(5) review requests for original classification authority from agencies or officials not granted original classification authority and, if deemed appropriate, recommend presidential approval;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the information security program;

(7) have the authority to prescribe, after consultation with affected agencies, standard forms that will promote the implementation of the information security program;

(8) report at least annually to the President through the National Security Council on the implementation of this Order; and

(9) have the authority to convene and chair interagency meetings to discuss matters pertaining to the information security program.

Sec. 5.3 General Responsibilities.

Agencies that originate or handle classified information shall:

(a) designate a senior agency official to direct and administer its information security program, which shall include an active oversight and security education program to ensure effective implementation of this Order;

(b) promulgate implementing regulations. Any unclassified regulations that establish agency information security policy shall be published in the Federal Register to the extent that these regulations affect members of the public;

(c) Establish procedures to prevent unnecessary access to classified information, including procedures that (i) require that a demonstrable need for access to classified information is established before initiating administrative clearance procedures, and (ii) ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs; and

(d) develop special contingency plans for the protection of classified information used in or near hostile or potentially hostile areas.

Sec. 5.4 Sanctions.

(a) If the Director of the Information Security Oversight office finds that a violation of the Order or its implementing directives may have occurred, the Director shall make a report to the head of the agency or to the senior official designated under Section 5.3(a)(1) so that corrective steps, if appropriate, may be taken.

(b) officers and employees of the United States Government, and its contractors, licensees, and grantees shall be subject to appropriate sanctions if they:

(1) knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under this order or predecessor orders;

(2) knowingly and willfully classify or continue the classification of information in violation of this Order or any implementing directive; or

(3) knowingly and willfully violate any other provision of this Order or implementing directive.

(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

(d) Each agency head or the senior official designated under Section 5.3(a)(1) shall ensure that appropriate and prompt corrective action is taken whenever a violation under Section 5.4(b) occurs. Either shall ensure that the Director of the Information Security Oversight Office is promptly notified whenever a violation under Section 5.4 (b)(1) or (2) occurs.

Part 6 General Provisions

Sec. 6.1 Definitions.

(a) "Agency" has the meaning provided at 5 U.S.C. 552(e).

(b) "Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States Government.

(c) "National security information" means information that has been determined pursuant to this Order or any predecessor order to require protection against unauthorized disclosure and that is so designated.

(d) "Foreign government information" means:

(1) information provided by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that the information. the source of the information, or both, are to be held in confidence; or

(2) information produced by the United States pursuant to or as a result or a joint arrangement with a foreign government or governments or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence.

(e) "National security" means the national defense or foreign relations of the United States.

(f) "Confidential source" means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation, expressed or implied, that the information or relationship, or both, be held in confidence.

(g) "Original classification" means an initial determination that information requires, in the interest of

national security, protection against unauthorized disclosure, together with a classification designation signifying the level of protection required.

Sec. 6.2 General.

(a) Nothing in this Order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended. "Restricted Data" and "Formerly Restricted Data" shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.

(b) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight office, shall render an interpretation of this Order with respect to any question arising in the course of its administration.

(c) Nothing in this Order limits the protection afforded any information by other provisions of law.

(d) Executive Order No. 12065 of June 28, 1978, as amended, is revoked as of the effective date of this Order.

(e) This order shall become effective on August 1, 1982.

Ronald Reagan

The White House, April 2, 1982.

[Filed with the Office of the Federal Register, 2:52 p.m., April 2, 1982]

LANGUAGE: ENGLISH

67TH DOCUMENT of Level 2 printed in FULL format.

Public Papers of the Presidents

April 17, 1995

CITE: 31 Weekly Comp. Pres. Doc. 633

LENGTH: 616 words

HEADLINE: Statement on Signing the Executive Order on Classified National Security Information

BODY:

Today I have signed an Executive order reforming the Government's system of secrecy. The order will lift the veil on millions of existing documents, keep a great many future documents from ever being classified, and still maintain necessary controls over information that legitimately needs to be guarded in the interests of national security.

In issuing this order, I am seeking to bring the system for classifying, safeguarding, and declassifying national security information into line with our vision of American democracy in the post-Cold War world.

This order strikes an appropriate balance. On the one hand, it will sharply reduce the permitted level of secrecy within our Government, making available to the American people and posterity most documents of permanent historical value that were maintained in secrecy until now.

On the other, the order enables us to safeguard the information that we must hold in confidence to protect our Nation and our citizens. We must continue to protect information that is critical to the pursuit of our national

security interests. There are some categories of information – for example, the war plans we may employ or the identities of clandestine human assets – that must remain protected.

This order also will reduce the sizable costs of secrecy – the tangible costs of needlessly guarding documents and the intangible costs of depriving ourselves of the fullest possible flow of information.

This order establishes many firsts: Classifiers will have to justify what they classify; employees will be encouraged and expected to challenge improper classification and protected from retribution for doing so; and large-scale declassification won't be dependent on the availability of individuals to conduct a line-by-line review. Rather, we will automatically declassify hundreds of millions of pages of information that were classified in the past 50 years.

Similarly, we will no longer tolerate the excesses of the current system. For example, we will resolve doubtful calls about classification in favor of keeping the information unclassified. We will not permit the reclassification of information after it has been declassified and disclosed under proper authority. We will authorize agency heads to balance the public interest in disclosure against the national security interest in making declassification decisions. And, we will no longer presumptively classify certain categories of information, whether or not the specific information otherwise meets the strict standards for classification. At the same time, however, we will maintain every necessary safeguard and procedure to

assure that appropriately classified information is fully protected.

Taken together, these reforms will greatly reduce the amount of information that we classify in the first place and the amount that remains classified. Perhaps most important, the reforms will create a classification system that Americans can trust to protect our national security in a reasonable, limited, and cost-effective manner.

In keeping with my goals and commitments, this order was drafted in an unprecedented environment of openness. We held open hearings and benefitted from the recommendations of interested Committees of Congress and nongovernmental organizations, groups, businesses, and individuals. The order I have signed today is stronger because of the advice we received from so many sources. I thank all those who have helped to establish this new system as a model for protecting our national security within the framework of a Government of, by, and for the people.

William J. Clinton

The White House, April 17, 1995.

LANGUAGE: ENGLISH

LOAD-DATE: May 16, 1995

Case Control No. 9502026
Requester: Weatherhead

Ms. Rachel Webb
British Embassy
3100 Massachusetts Avenue, N.W.
Washington, D.C. 20008

Dear Ms. Webb:

We have received a request under a provision of U.S. law for release of the enclosed document.

Before complying with this request, we would appreciate the concurrence of your government in the release of the document. Should your government wish to release only a part of this material, please indicate with brackets the portions you wish withheld.

In responding to our letter, please refer to the case control number shown above and return the document to us. Thank you for your cooperation.

Sincerely,

Joseph P. Leahy
Liaison Officer
Office of Freedom of
Information, Privacy, and
Classification Review

Enclosure:
One document; total pages two.

KENNEDY DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 1

[LOGO]

British Embassy
Washington

3100 Massachusetts Ave., N.W.
Washington D.C. 20006-3600

Telephone: (202)

Facsimile: (202) 898-4241
898-4255

Mr Joseph P Leahy
Liaison Officer
Office of Freedom of Information
Privacy & Classification Review
State Department

Dear Mr. Leahy,

DECLASSIFICATION REQUEST: CASE CONTROL NUMBER 9502026

I am writing in response to your letter dated 4 August. The Foreign and Commonwealth Office have reviewed the attached document and after careful consideration, are *unable to agree to its release*. The Home Office have advised that the normal line in cases like this is that all correspondence between Governments is confidential unless papers have been formally requisitioned by the defence. In this particular case, requests from representatives of the defendants for sight of the letter have already been refused on grounds of confidentiality.

Our Library and Records Department would also be concerned about the precedent set by releasing even part of the letter since any such development would quickly

become common knowledge amongst lawyers dealing with extradition matters.

Yours Sincerely,

Rachel Webb

Rachel Webb

KENNEDY DECLARATION
CIVIL ACTION NO. 95-0519
EXHIBIT 2